SUPREME COURT, U.S.
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No. 96-

In the

Supreme Court of the United States

October Term, 1996

BARBARA BELL,

Petitioner,

v.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a fifty-foot buffer zone which was justified on the basis of petitioner's "upsetting statements" in a traditional public forum is an unconstitutional content-based restriction on free speech.

II. Whether a state court's sweeping endorsement of a fifty-foot buffer zone, directed at a single individual, is broader than necessary to achieve the pertinent governmental interests.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts in this case.

OPINIONS BELOW

The Opinion and Order of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated March 18, 1997,

is reported at 424 Mass. 573, 677 N.E.2d 204 (Mass. 1997), and attached hereto as Appendix C. The Order of the Appeals Court of the Commonwealth, dated May 30, 1995, is unreported and attached hereto as Appendix B. The Findings of Fact, Rulings of Law and Order of the Superior Court of the Commonwealth, dated February 28, 1995, is unreported and attached hereto as Appendix A.

JURISDICTION

This case seeks review of a decision of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on March 18, 1997. This is a civil case. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

"Congress shall make no law . . . abridging the freedom of speech . . ."

United States Constitution, Amendment XIV

"Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 21, 1994, Planned Parenthood League of Massachusetts, Inc. ("PPLM"), filed suit against Barbara Bell, a sole, African-American sidewalk counsellor, seeking an in-

junction restraining Bell from entering fifty feet in front of, or to the right or left of, the property line of the Planned Parenthood Clinic located at 1031 and 1033 Beacon Street, Brookline, Massachusetts (the "Clinic"), during the hours of Clinic operation (R.A. 10). Bell defended her behavior on the grounds that her sidewalk counseling and leafleting were constitutionally protected under the First Amendment of the United States Constitution.

Barbara Bell had previously received two permanent injunctions and agreed to one Stipulation and Order restricting her behavior in 1991 (R.A. 12, 14, 16). The court orders restricted Bell from wearing an apron or pinney signifying that she was affiliated with PPLM, from blocking or physically restraining anyone from entering the Clinic, and from using any electronic or sound amplification device to project her voice into the Clinic.

The Superior Court conducted two days of evidentiary hearings on November 10, 1994, and February 24, 1995, in which it heard arguments from both PPLM and Barbara Bell. On February 28, 1995, the court granted a preliminary injunction to enjoin Bell from entering within fifty feet of the Clinic's property during hours of operation. *Planned Parenthood League of Massachusetts v. Bell* (App. 1a). The Superior Court referred to the content of Bell's speech in three different places in its decision which found that she had "intentionally and purposefully crossed the boundary from conduct protected by the First Amendment to prohibited conduct" (R.A. 29, 31, 34). The trial judge found that Bell had violated the two prior injunctions regarding the pinney and access to the Clinic. The Superior Court concluded that Bell had created a nuisance when she made "intimidating and upsetting statements to patients" outside the Clinic (R.A. 31).

PPLM submitted a video of Barbara Bell's behavior outside the Clinic as evidence. This video was approximately ten

minutes long, and had been edited from its original length of one hour and twenty minutes. All of the Clinic's witnesses testified that the video was an "accurate representation" of Bell's conduct (Tr. 37, 61). Neither the video nor the witnesses indicated that Bell had ever touched any patients or physically prevented them from entering the Clinic. Moreover, the trial judge found that the video contained no evidence of Bell blocking patients entering the Clinic (Tr. 123). The video and testimony of all five witnesses demonstrated that Bell would move to one side or another while she was speaking to patients. PPLM labeled this behavior a "walking blockade." (Tr. 18.)

On May 30, 1995, a single justice of the Appeals Court for the Commonwealth of Massachusetts affirmed the issuance of the preliminary injunction against Barbara Bell. *Planned Parenthood League of Massachusetts v. Bell* (App. 10a). The Appeals Court held that the preliminary injunction granted by the trial judge did not burden more speech than necessary to serve the significant governmental interest of ensuring a woman's right to have access to lawful medical or counseling services.

On regular appeal to the Supreme Judicial Court of the Commonwealth of Massachusetts, Barbara Bell argued that the preliminary injunction imposed on her was an infringement on her First Amendment rights because it was both content-based and overbroad. Moreover, Bell contended that she did not prevent any patients from entering the Clinic by blocking their path of travel, she merely engaged in sidewalk counseling which required her to leaflet and speak in close proximity to potential patients. Bell argued that the alleged nuisance caused by the volume of her voice could be abated by an issuance of an order forbidding her from speaking so loudly, and that the alleged violations of previous injunctions

could be addressed by filing contempt proceedings against her, rather than issuing an expanded injunction.

PPLM argued, first, that Barbara Bell's appeal could not be granted unless the court found a clear error of law or abuse of discretion. Second, PPLM contended that the injunction was a reasonable time, place, and manner restriction which did not violate the First Amendment. PPLM argued that the injunction was justified without reference to the content of Bell's speech, that it is narrowly tailored, and that the injunction leaves open alternative channels of communication.

On behalf of PPLM, the Attorney General of the Commonwealth of Massachusetts submitted an *amicus curiae* brief in which he acknowledged the constitutional necessity of a *de novo* review. The Attorney General argued that Bell was entitled to a *de novo* review of the record to determine whether her sidewalk counseling was prohibited conduct or protected speech under the First Amendment. Bell argued in her reply brief that a *de novo* standard of review should be used when examining her behavior to determine whether she crossed the line between protected speech and prohibited conduct.

On March 18, 1997, the Supreme Judicial Court affirmed the preliminary injunction on the grounds that the purpose of the injunction was not to suppress Barbara Bell's antiabortion message, but rather to prevent her from further engaging in objectionable activity. Secondly, the Supreme Judicial Court found that the fifty-foot-distance restriction imposed on Barbara Bell did not burden more speech than necessary to serve the significant public interest at stake. *Planned Parenthood League of Massachusetts, Inc. v. Bell*, 424 Mass. 573, 677 N.E.2d 204 (App. 12a).

REASONS FOR GRANTING THE WRIT*

If the final decision of the Supreme Judicial Court of Massachusetts is allowed to stand, then the precedent would undermine First Amendment freedoms that this Court has been careful to protect.

The applicable Supreme Court precedent is quite clear that buffer zone injunctions need to be justified on a content-neutral basis and be no broader than necessary to achieve governmental interests. *Madsen v. Women's Health Care, Inc.*, 512 U.S. 753, 763, 767 (1994); *Schenck v. ProChoice Network of Western N.Y.*, 117 S. Ct. 855, 865 n.6, 866-67 (1997). In this case, however, the trial court based the injunction on Barbara Bell's "intimidating and upsetting statements to patients" on the public sidewalk. In its Order, the Superior Court referred in three different places to the actual content of Bell's speech, quoting her directly. *Planned Parenthood League of Massachusetts v. Bell* (App. 3a, 4a, 5a). The Massachusetts Supreme Judicial Court nevertheless affirmed the issuance of a sweeping 50-foot buffer around the perimeter of the Clinic's property line. The injunction effectively removed Bell's solitary protest from the entire public sidewalk surrounding the Clinic and placed her clear across three lanes to the other side of the trolley tracks.

If the First and Fourteenth Amendments' requirement of content neutrality can be so easily sidestepped, and a single individual can be effectively "banned in Brookline" on the basis of supposedly securing physical access that was not at issue, then state and federal courts will be able to engage in unchecked censorship in the public forum under the guise of

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* We express our thanks to Southern New England law student, Clark R. Whaley; Pro-Life Legal Defense Fund summer intern, Dawn Marie O'Brien; and Jerome D. Maryon, Esq., who is currently working toward a Ph.D. at Boston College, for their substantive contribution to this Petition.

controlling secondary effects of speech. But the truth is that saying the regulation is content-neutral does not make it so.

I. THE FIFTY-FOOT BUFFER ZONE WAS BASED ON THE CONTENT OF PETITIONER'S SPEECH.

A. *There Is No General Right To Be Protected Against Upsetting Advocacy On A Public Commercial Sidewalk.*

The law is clear: The exercise of free speech in the archetypal public forum in a vigorous and fervent manner cannot be infringed. Accordingly, there is no precedent for prohibiting a solitary, non-violent picketer from conversing and leafleting at a normal conversational distance.

Would a court, in the absence of obscenities, fighting words, or physical contact, be able to impose an injunction on a lone Jewish woman, banning her from picketing on the public sidewalk in front of a gentiles-only country club? Or, similarly, would a court rule against a lone union organizer, picketing on the public sidewalk outside a closed-shop factory, removing her from the public sidewalk? No: Any proferred rationale could not conceal the content-based nature of the picketer's removal.

The First Amendment is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People, 27 (1948). Pro-life advocacy should in no way be denied this "equal opportunity to be heard," or to be "uninhibited, robust, and wide open."

The traditional exercise of free speech *in the form of personal engagement* must occur in one of three places: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). Of these three places, the sidewalk is the archetypal public forum.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague, Mayor v. CIO, 307 U.S. 496, 515 (1939). This traditional treatment distinguishes the commercial urban sidewalk from the purely residential or the suburban sidewalk, both of which are less likely venues for assembly or communications; *see, e.g.*, *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (CA6, 1995), and *Kirkeby v. Furness*, 92 F.3d 655 (CA8, 1996), both applying the rules on residential picketing set forth by this Court in *Frisby v. Schultz*, 487 U.S. 474 (1988).

New England is the home of the American town meeting, of the "full and frank exchange of views" that occurs not only in the town hall, but spontaneously on the village green and on the city streets. In Boston or Brookline, urban sidewalks remain precisely the "places which by long tradition . . . have been devoted to assembly and debate," and they are thus the place in which "the rights of the State to limit expressive activity are sharply circumscribed." *Perry Education Ass'n v.*

Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See generally Carey, State's Attorney of Cook County v. Brown*, 447 U.S. 455 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); and *Cox v. New Hampshire*, 312 U.S. 569 (1941). Pro-life advocacy must not be denied full access to the archetypal public forum: the public sidewalks.

This Court has long recognized that a difference in forum will often entail a difference in emotional expression and response.

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

Hughes v. Superior Court, 339 U.S. 460, 465 (1950). Thus, regarding a black man's fiery speeches calling on his fellow African-Americans to unify in a boycott, this Court observed that,

> strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals . . . [W]hen such appeals do not incite lawless action, they must be regarded as protected speech.

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). In sum, an unfettered exchange of ideas entails "'vigorous advocacy' no less than 'abstract discussion.'" *New York Times*, *supra*, 376 U.S. at 269, quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963).

Where the right to engage in such "strong and effective extemporaneous rhetoric" applies, so do leafleting and personal engagement. "One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views by handbills and literature as well as by the spoken word." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). The pro-life picketer has as much right as the Jehovah's Witness to distribute leaflets espousing her most fervent moral and religious beliefs. But then she must also have the right to express these fervent beliefs fervently — be they ever so unwelcome to some passers-by.

> As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'

Boos v. Barry, 485 U.S. 312, 322 (1988), quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

There is no general right to be protected against this vigorous and fervent exercise of free speech in the archetypal public forum. Even on a public sidewalk fronting an abortion clinic, the immediate unpopularity of pro-life advocacy in no way diminishes its constitutional protection, for this protection must never turn upon "'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times*, *supra*, 376 U.S. at 271, quoting *NAACP v. Button, supra*, 371 U.S. at 445. Indeed, the right to abortion does not entail a

special right under 42 U.S.C. § 1985 (3) to be protected against private encroachment. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993). *A fortiori*, the right to abortion does not entail a special right of protection against public sidewalk pro-life advocacy, not even where this protection would be granted under the guise of content-neutral regulations or injunctions.

Thus, at the threshold stage of analysis, a rule of jurisprudence spans the better part of this century, ranging from picketing rights from New Deal union days through the Civil Rights era to abortion today. There is, however, a bright line which needs to be drawn here. For without this line, the exception to the general liberal rule of jurisprudence threatens, as in the instant case, to swallow the rule. The exception is that there is no right to vigorous, fervent advocacy in a medical facility. As noted by the court below and as fully incorporated by petitioner upon appeal, the "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Planned Parenthood League of Massachusetts, Inc. v. Bell*, 424 Mass. 573, 581, 677 N.E. 2d 204, 210 (1997), quoting this Court in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 772-773 (1994).

The bright line is a simple judicial distinction — never recognized below — between directing advocacy inside a clinic and outside in the public forum. Petitioner agreed with PPLM in a written Stipulation and Order that she would "not use any electronic or other sound amplification device or bullhorn for purposes of amplifying any noise, including but not limited to sounds from any audiocassette tape," such that it would reach the interior of PPLM's Clinic during operational hours. The Stipulation was signed and dated January 23, 1991 (R.A. 16). It was never alleged to have been violated. Petitioner has consistently maintained that if the Clinic operators find the normal

level of her voice still too audible for the comfort of patients in the waiting room, then a new stipulation or injunction would be the proper remedy, as discussed below, in Question II's treatment of "precision of regulation." The relevant point here is that PPLM instead chose to demand petitioner's removal altogether. In one stroke, the Clinic not only eliminated her voice from the waiting room, but also eliminated her right of personal engagement on the public sidewalk.[1]

It is beyond dispute that such a remedy could not stand today in the hypothetical instances of removing a picket from in front of the closed-shop factory or the gentiles-only country club. Such dissimilar treatment suggests that petitioner's per-

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[1] Despite petitioner's adherence to the Stipulation against amplification and to the injunction against blocking access, much judicial ink was devoted to her attempted adherence to what she thought was the requirement of the pinney injunction. *Bell*, 424 Mass. at 580, 677 N.E.2d at 209. Immediately upon the handing down of this injunction, petitioner removed the "Clinic" label, substituting for it "Choose Life." Her thought was that if PPLM wished to have her remove the pinney entirely, they could easily get an injunction to that effect or, if they believed they had it already, then they could just as easily cite her for contempt. When the pinney matter is placed in the context of her adherence to every other order, it fails to support PPLM's contention that she had a cavalier contempt for court orders. *A fortiori*, it fails to support respondent's contention that the only suitable remedy was to deprive her entirely of her First Amendment right to personal engagement where not a single showing was made in the course of evidence covering five years of picketing that a would-be client of the Clinic had been misled by petitioner's pinney and, as a consequence, had abandoned her planned abortion. The deprivation of a First Amendment right is an egregiously overbroad response, as shown in II, *infra*. It is also a sure sign of the true nature of that response. For when it is this overbroad, it is not the pinney that is being targeted, it is petitioner's very presence that was targeted for removal. The pinney was merely a peg on which to hang a politically convenient decision. And all the rationale devoted to the colors of the pinney served only to dress up the decision. First Amendment rights should never be attacked for a misinterpretation of a clothing injunction. That is Draconian.

sonal advocacy has struck a nerve. The hearing record reflects not only PPLM's repetitious testimony as to the actual content of her statements, but also the trial court's reiteration thereof, *e.g.*, "Hear your baby crying out, 'Please don't kill me,'" and "No mother is ever the same after her baby's been ripped out of her womb." Tr. 22, 23, 36, 56, 57, 60, 63, and 179; App. 3a, 4a, 5a. But objections to those comments on the public sidewalk cannot be characterized fairly as anything other than content-based, and where, as here, such objection is not grounded in any compelling state interest, the restriction is unconstitutional.

A critical "'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Texas v. Johnson*, 491 U.S. 397, 408-9 (1989), quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *see also Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Hustler, supra,* 485 U.S. at 55-56; *NAACP v. Claiborne*, *supra*, 458 U.S. at 910; *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978).

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . ., is nevertheless protected against censorship or punishment, unless known likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our constitution for a more restrictive view.

Terminiello, 337 U.S. at 4.

But the inescapable effect of the decisions below is that pro-life advocacy does fall under a more restrictive view. The comparison repeatedly drawn at the initial hearings reveals the content-based nature of the removal of petitioner. Other pro-life advocates, e.g., at the once-a-month prayer gathering, would hold their signs, quietly recite the Rosary, and hand out the occasional leaflet — all very decorous conduct. Petitioner's conduct has never been decorous in front of this Clinic: it has always consisted of personal pleas that upset some of the clients of the Clinic. As a direct consequence, she has been removed from the public sidewalk clear across three lanes to the other side of the trolley tracks. With no showing of "a clear and present danger of a serious substantive evil,"[2] but repetitious showing of provocative and challenging remarks, petitioner has been removed fifty feet. In ethnic, racial, and union picketing, full constitutional protection of vigorous and fervent engagement still obtains; but in abortion picketing, Massachusetts would have us believe that we must be specially circumspect — like the once-a-month Rosary gathering — or be removed.

B. *Despite The Unique Definition Of "Blocking" Crafted Below, There Was No Finding That Petitioner Had Physically Blocked A Single Vehicle From Parking At The Clinic Or A Single Person From Entering The Clinic.*

In her opening statement, counsel for PPLM acknowledged that Bell "does not block access in a way that was an issue-

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[2] PPLM could not adduce a single instance of a would-be client who had substantially postponed her abortion and thus not a single instance of medical complication. All it could show was that an unspecified number of clients entered "upset."

when the injunction [against obstructing access] was issued. . . . In other words, the patient is able to get into the clinic. . ." Tr. 18. The absence of real blocking in this case confirms the content-based nature of the injunction.

The trial court initially found that the videotape of petitioner's actions, made and fully endorsed by respondent, "shows no blocking, whatsoever. It most assuredly does show that she runs up to patients. But I don't think we have evidence of blocking." Tr. 123. Later, in the written decision, the same judge reached a unique definition of blocking:

> An imposing person who is approximately five feet, ten inches tall, Bell confronts patients by walking in front of or in close proximity to them as they approach the Clinic. As Bell blocks patients, she more or less steadily shouts such statements as: "Hear your baby crying out [,] 'Please don't kill me,'" and "No mother is ever the same after her baby's been ripped out of her womb." (App. 3a.)

In the final state court review, the Supreme Judicial Court noted correctly but irrelevantly that an independent appellate review would not limit deference to a trial judge on matters of witness credibility. *Bell,* 424 Mass. at 583, 677 N.E. 2d at 211. No one had contested petitioner's close physical proximity to would-be clients of the Clinic; indeed, the whole thrust of PPLM's action below was to remove this proximity. The videotape and both sides' testimony tended to show that petitioner usually stood behind or beside the client and Clinic escorts, and only rarely in front — any of which positions resulted in a "dance" to the door of the Clinic. The final appellate review found that petitioner was "routinely positioned" to block clients. The court's authority for that notion of block-

ing? Webster's Dictionary. No precedent of this Court could be found to support the proposition that vigorous and fervent advocacy *ipso facto* constitutes "blocking." *Madsen* and *Schenck* were never distinguished; on this point, they were ignored.

And where not a single instance in five years could be adduced of petitioner's having touched, still less stopped, a vehicle or a patron, the record was similarly ignored. Instead, the court moved on immediately to the gratuitous observation that sidewalk counseling does not permit obstruction. This might politely be called begging the question — but for the consequences.

By ignoring at once the record below and this Court's decrees, the Supreme Judicial Court of Massachusetts, rushing to craft that unique definition of "blocking," inadvertently betrayed both of its duties: (1) The decision fails on its face to demonstrate independent *de novo* review of the record below. No 5'10" woman, just by virtue of close, loud advocacy, can be said to "block" those whom she has neither touched nor stopped. (2) By not wanting to distinguish this Court's long and consistent holdings on picketing in general, still less even mentioning the on-point holdings of *Madsen* and *Schenck*, the opinion implicitly rejects this Court's authority on the matter.

C. *Where A Decision Turns On Listeners' Reaction, The Removal Of The Speaker From Personal Engagement Is Not A "Secondary Effect" And Thus Not Content-Neutral.*

The third stage of petitioner's analysis would expose another area of constitutional neglect below. Here, again, the analyses of this Court were apparently ignored.

As defined in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), "secondary effects" are secondary features of a

regulation or injunction that happen to be associated with a particular type of speech but which have nothing directly to do with its content. This determination of direct and secondary effect can be difficult, as seen, *e.g.*, in *Boos v. Barry*, 485 U. S. 312 (1988). But what is not disputed is that "listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos*, 485 U.S. at 321; *Crawford v. Lungren*, 96 F.3d 380, 385 (CA9, 1996).

The upsetting effect of the plea, "Don't kill your baby!" is not at all secondary: it is a listener's reaction. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993); *Berry v. City of Santa Barbara*, 40 Cal. App. 4th 1075, 1084 (1995); *Sebago, Inc. v. City of Alameda*, 211 Cal. App. 4th 1075, 1084 (1989). Despite petitioner's repeated assertions below that her removal from personal engagement with would-be clients of the Clinic would similarly be content-based, no distinction was ever drawn below between her removal and the various removals effected under *Boos, Renton,* and *Crawford*.

A mere declaration that petitioner's removal was not content-based was apparently thought sufficient. But with such a grave curtailment of First Amendment rights, mere assumptions of constitutionality are *never* sufficient.

D. *The Content-Based Decision To Remove Petitioner From Sidewalk Engagement With The Clinic's Clients Cannot Be Justified By The Plea That She Can Exercise Free Speech Fifty Feet Away.*

Justice Roberts, writing for a unanimous Court in *Schneider v. State*, 308 U.S. 147 (1939), set forth the two steps governing restrictions on speech in the public forum.

First: "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and

available for movement of people and property, the primary purpose to which the streets are dedicated." *Id.* at 160. As noted above, in five years' protesting, not a single instance was adduced of petitioner having touched, much less stopped, a pedestrian or a vehicle outside the Clinic. Thus, despite the *petitio principii*, the gratuitous definition of "blocking" by the courts below, not a single instance of interference with the "primary purpose of the streets" is in evidence.

Second: "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163. But this is just what the court below concluded: "Bell can still engage in constitutionally protected speech while standing across the street . . ." *Bell,* 424 Mass. at 585, 677 N.E.2d at 212.

Where vehicular and pedestrian traffic have never been stopped, no court is empowered to remove a picket fifty feet for the convenience of would-be clients of the Clinic. For insulation from questioning and criticism can never amount to a legitimate, let alone a compelling, state interest. The only state interest has already been identified above: having petitioner lower her voice so that clients in the waiting room will not hear her. And, as also noted above, the state has no legitimate interest, much less a compelling interest, in shielding pedestrians from pro-life advocacy.

Because it will be argued below, in Question II, that petitioner's removal does not pass the "intermediate scrutiny" mandated for content-neutral injunctions by *Madsen* and *Schenck*, it can more briefly be suggested here that no higher "strict scrutiny" against a content-based injunction could logically be survived by the actions below. As long as the decision below stands, as long as petitioner can be forced to exercise her freedom of speech from across the trolley tracks for the

convenience of arriving clients, this Court's work has been in vain.

II. A Fifty-Foot Buffer Zone Directed At A Single Individual Is Unconstitutional Because It Is A Broader Restriction Than Is Necessary To Ensure The Pertinent Government Interests Of Access To Clinics And The Maintenance Of A Quiet Atmosphere Within Clinics.

A. *Even If The Restrictions On Bell's Speech Were Content-Neutral Rather Than Content-Based, The Injunction Would Still Be Unconstitutionally Overbroad.*

Even if the restrictions on Bell's speech were content-neutral rather than content-based, the injunction would still be unconstitutionally overbroad because it burdens more speech than is necessary to further a significant government interest. *Schenck v. ProChoice Network of Western N.Y.*, 117 S.Ct. 855, 864 (1997); *Madsen v. Women's Health Care, Inc.*, 512 U.S. 753, 765 (1994). In addition, it does not provide Bell with an adequate alternative means of communicating her message. *Id.* Of course, the state does have a significant interest in assuring patients' access to clinics and maintaining quiet inside clinics. *Id.*; *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783-84 n. 12 (1979). But "an order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183-184 (1968). Injunctions must be even more precisely tailored than ordinances, which need only be narrowly tailored. *Madsen*, 512 U.S. at 765; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982); *NAACP v.*

Button, 371 U.S. 415, 438 (1963). "[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Keyishian v. Board of Regents*, 385 U.S. 589, 603-4 (1967) quoting *Button*, 371 U.S. at 438.

The injunction against Bell is not precisely tailored to further the pertinent state interests. Bell is not permitted to exercise any form of speech within the fifty-foot buffer zone. *Id.*; *Madsen*, 512 U.S. at 765; *Claiborne*, 458 U.S. at 916; *Button*, 371 U.S. at 438. Removing Bell to the opposite side of the street from the Clinic prevents Bell from leafleting and from speaking to patients in a conversational tone. These practices are an essential part of sidewalk counseling. In *Schenck*, this Court struck down a fifteen-foot floating buffer zone, and highlighted the importance of the right to leaflet and speak from a normal conversational distance:

> The floating buffer zones prevent defendants — except for two sidewalk counselors, while they are tolerated by the targeted individual — from communicating a message from a normal conversational distance or handing leaflets to people who are walking on public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a protypical example of a traditional public forum.

117 S.Ct. at 867.

While it struck down the floating buffer zone, this Court in *Schenck* upheld a fifteen-foot fixed buffer-zone around the en-

trance of an abortion clinic. The fixed buffer zone in *Schenck* was quite different from the one in petitioner's case, however. First, the *Schenck* fixed buffer zone was much smaller than the one here. Second, the *Schenck* fixed buffer zone removed all picketers from within fifteen feet of the clinic entranceway and thus it was related to the legitimate governmental interest of assuring access to the clinic. In contrast, the injunction issued against Bell is aimed specifically against one woman who has not physically prevented any individual from actually entering the clinic. *See, e.g.*, Tr. 18. It is a fifty-foot buffer zone around the entire perimeter of clinic property which completely excludes only Bell from the public sidewalk outside the clinic and places her across the street and over the trolley tracks.

There is no precedent for this type of injunction. In fact, an injunction like the one aimed at Bell has been declared unconstitutionally overbroad by the Ninth Circuit. In *U.S. v. Dinwiddie*, 76 F.3d 913 (CA9, 1996), the portion of an injunction which prohibited a picketer from entering within five hundred feet of a reproductive health-care facility unless she was engaged in "legitimate personal activity that could not be remotely construed to violate FACE" was constitutionally overbroad because it burdened more speech than was necessary. *Id.* at 927. The picketer in that case was still permitted to carry a placard, distribute literature, and speak without an amplifier so long as she did not "intimidate, interfere with, or physically obstruct anyone or violate any local noise ordinance." *Id.* The injunction against Bell is even more violative of the First Amendment than was the injunction in *Dinwiddie* because Bell may not enter within fifty feet of the clinic for *any purpose whatsoever.*

In addition, placing Bell across the street does not effectively abate the alleged public nuisance; it merely moves the nuisance. In fact, it forces Bell to shout even louder in order

to reach her intended audience of pregnant women seeking abortions. It is also not an adequate alternative means of communication because the nature of sidewalk counseling necessitates that the counselor speak in a conversational tone with the pregnant woman. The injunction makes this impossible. In this respect, the restrictions placed on Bell are more like those of the floating buffer zone which was struck down in *Schenck* than the fixed buffer zone which was upheld.

B. *PPLM Has Not Met Its Burden Of Showing That The Alternative, Less Burdensome Restrictions Of Ordering Bell To Lower Her Voice And Filing Contempt Charges For Alleged Violation Of Previous Injunctions Would Not Be Effective.*

If the plaintiff or the Court can imagine some other less burdensome means of restricting the plaintiff, the state has the ultimate burden of showing that this means is not effective. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126-29 (1989). Even if the government has a "legitimate and substantial" purpose, that "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

There are two clearly less restrictive means of protecting the relevant state interests in this case. Rather than setting Bell back fifty feet from the Clinic, the court could have simply ordered her to lower her voice. The Clinic could have filed contempt charges against her, alleging that she violated past injunctions by wearing pinneys like those worn by clinic workers and by blocking patients' access to the Clinic.

It should be noted, however, that there is no evidence that Barbara Bell's activity on the sidewalk outside the clinic has blocked the entrance of women into the clinic (Tr. 18) ("The

patient is able to get into the clinic"), or that Bell's pinney has misled any woman into thinking that Bell was actually a clinic worker. The fact that some women who were confronted by Bell turned away from the clinic, (Tr. 41, Supp. R.A. 2), is evidence not of "blocking," but of the effectiveness of Bell's speech. PPLM has not shown that any woman who has turned away as a result of Bell's speech has later returned for an abortion which was complicated by the delay.

The videotape, introduced as evidence by the plaintiff, clearly shows that Bell walks alongside or behind patients rather than in front of them, and that she moves aside to let them emerge from their cars as they pull up to the clinic. The trial court said: "[A] careful review of that tape . . . shows no blocking whatsoever." (Tr. 123). Plaintiff's witnesses acknowledged that the video was an "accurate description" of Bell's activity outside the clinic. (Tr. 37, 61). The injunction is improper since the plaintiff has an adequate remedy under the permanent injunction issued by Judged Lauriat which prohibits, in part, "physically restraining or obstructing" any person or "blocking or in any way obstructing access (either ingress or egress) to any facility in the Commonwealth which provides abortion counseling or services." (R.A. 13).

Where an injunction burdens more speech than is necessary to further the pertinent state interest because there exists a means of furthering that interest that is less burdensome to a picketer's First Amendment rights, the injunction is constitutionally overbroad.

CONCLUSION

This Court has just recently emphasized the importance of "communicating a message from a normal conversational distance or handing leaflets to people who are walking on public sidewalks . . . both because of the type of speech . . . and the

nature of the location." *Schenck*, 117 S.Ct. at 867. If the *Bell* decision stands, these words might just as well not have been written.

For all the foregoing reasons, Petitioner prays that this Court review this case by writ of certiorari.

Respectfully submitted,

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June 13, 1997

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APPENDIX A.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 94-6090

PLANNED PARENTHOOD LEAGUE
OF MASSACHUSETTS, INC.,
Plaintiff

vs.

BARBARA BELL,
Defendant

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiff Planned Parenthood League of Massachusetts, Inc. (Planned Parenthood) seeks injunctive relief against defendant Barbara Bell for Bell's alleged interference with women's rights to abortion where such actions breach the common law of nuisance. Specifically, Planned Parenthood asks the Court to create a 50-foot buffer zone around the Planned Parenthood Clinic at 1031 Beacon Street, Brookline, Massachusetts ("the Clinic"), which Bell could not enter.

Evidentiary hearings were held on November 10, 1994 and February 24, 1995, at which plaintiff presented four

witnesses[1] and introduced a composite videotape of approximately 10 minutes showing Bell's conduct on six separate occasions.[2] Defendant called one witness, Constance Cronin, who has been a sidewalk counsellor at the Clinic during the last five years.

Upon consideration of the testimony of the witnesses, the videotape admitted into evidence, the oral arguments of counsel and their memoranda, I make the following findings of fact and rulings of law. I make each finding of fact by a preponderance of the credible evidence and such reasonable inferences as I draw therefrom.

FINDINGS OF FACT

Planned Parenthood is a non-profit corporation which maintains a clinic in Brookline that provides abortion and other family planning services. The Clinic occupies rooms on the first floor of the buildings at 1031 and 1033 Beacon Street. The rooms include a waiting area and counselling, medical procedure, recovery and staff meeting rooms. The Clinic owns 1033 Beacon Street and leases 1031 Beacon Street.

Since October 17, 1991 Bell has been permanently enjoined (Lauriat, J.) from representing to anyone that she is acting as an escort for, or is in any way affiliated with the Clinic, or wearing an apron or pinney or other identification signifying that she is an escort for, or in any way affiliated with the Clinic. In issuing this injunction, Judge Lauriat found that

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[1] The witnesses called by Planned Parenthood include Alice Verhoeven, Clinic Director; Merry Hummell, Assistant Clinic Coordinator; Isabel Guttell, a Clinic volunteer for five years and a Clinic escort captain; and Ellen P. Fisher, a Clinic volunteer for seven years who is now its Escort Coordinator.

[2] The original videotapes were approximately one hour and 20 minutes in length.

Bell by wearing Clinic escort pinneys and representing herself as an agent of Planned Parenthood intended to harass and annoy patients.

Since October 28, 1991 Bell has been permanently enjoined (Lauriat, J.) from trespassing on, blocking, or in any way obstructing access to any clinic in the Commonwealth which provides abortion services, or physically restraining or obstructing or committing any acts of force or violence against persons entering, leaving, working at, or seeking to obtain services from any such clinic. Bell is also subject to a Stipulation and Order dated January 23, 1991 (Lauriat, J.) barring her from using any electronic or other sound amplification device or bullhorn to project any noise, including her own voice, such that it reaches the interior of the Clinic.

On a regular basis since at least June 25, 1994, Bell has positioned herself outside the Clinic and has approached patients and persons accompanying them. Bell periodically follows potential patients across the MBTA tracks as they leave the trolleys and cross Beacon Street to reach the Clinic. She also approaches cars parked on Beacon Street which are attempting to drop off patients. As they do, she rushes toward those patients and makes uninvited contact.

An imposing person who is approximately five feet, ten inches tall, Bell confronts patients by walking in front of or in close proximity to them as they approach the Clinic. As Bell blocks patients, she more or less steadily shouts such statements as: "Hear your baby crying out 'Please don't kill me,'" and "No mother is ever the same after her baby's been ripped out of her womb."

Some patients confronted by Bell turn away from the Clinic. Others indicate their desire to avoid Bell by raising an outstretched hand to block her advances and her voice, and/or by walking quickly away from her. Nonetheless, Bell persists

in her tactics. In fact, when patients walk or run from her, Bell shouts such comments as "How can you run into a death camp to kill your own baby?" While Clinic protestors other than Bell often stand beside and behind patients, Bell alone stands in front of patients, on occasion blocking them.

When Clinic appointments are scheduled, the staff instruct patients to look for Clinic escorts if they need assistance entering the Clinic. Bell has resumed her practice of wearing a pinney which is a copy of those worn by Clinic escorts.[3] Although Bell's pinney is not labeled "Clinic Escort," it bears such a strong resemblance to those worn by Clinic escorts that some patients approaching the Clinic become confused as to which persons are the true Clinic escorts. In addition, patients who cannot read English are likely to be confused about the true escorts. By wearing a pinney which misrepresents that she is affiliated with the Clinic, Bell is violating the permanent injunction issued on October 17, 1991.

Patients who visit the Clinic for abortion and other medical services generally spend between 20 minutes and one hour in the waiting room. Persons who accompany patients may spend between 3 1/2 and 4 hours in the waiting room. Bell frequently positions herself approximately 10 feet from the Clinic and shouts statements similar to those described above to the patients who have entered the Clinic and are sitting in the waiting room. Bell's booming voice is often audible inside the Clinic, while other sounds from the street, including the trolley, are almost inaudible. Despite the Clinic's efforts to minimize the impact of Bell's voice by such devices as playing music and using room air conditioners, Bell's voice remains audible to waiting room patients. Bell's shouts distress Clinic patients and staff, create anxiety, and often

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[3] When the pinney injunction issued, Clinic escorts wore blue pinneys, and Bell wore a blue pinney. Clinic escorts now generally wear yellow pinneys, and Bell wears the same.

impede effective provision of medical services. As a result of Bell's conduct outside the Clinic, some patients cry, tremble and exhibit similar signs of fear and apprehension when they enter the Clinic. Consequently, Clinic staff spend time calming patients which would otherwise be spent providing medical services. In addition, certain patients, when confronted with Bell's actions, turn away from the Clinic. If patients do not keep their scheduled appointments and choose to return at a later date, they may experience increased health risks as a result of the delay.

On December 30, 1994, a shooting occurred at the Clinic. As a result, a number of people were injured, and the Clinic's receptionist, Shannon Lowney, was killed. Since the shooting, Bell has continued to position herself outside the Clinic on a regular basis, typically every Saturday since the Clinic reopened. Bell continues to rush toward patients as soon as they leave their vehicles or the MBTA trolleys. She follows and blocks patients as they approach the Clinic, shouting such statements as "How can you as a mother slaughter your own flesh and blood?" and "No mother's the same after her baby's dead and gone." On two occasions since December 30, 1994, Bell has toned down her voice for a portion of the day.

Since the December 30, 1994 shooting, Bell also persists in her practice of wearing a pinney which is a copy of those worn by Clinic escorts. For example, on Saturday, February 11, 1995, the Clinic escorts began the day wearing yellow pinneys. At approximately 9:00 a.m., the escorts changed into blue pinneys. When they changed, Bell did the same.

Since the December 30, 1994 shooting, the adverse reaction of Clinic patients to Bell's conduct has intensified. Patients are more upset and frightened by Bell's conduct than before. Since the shooting, the Clinic has installed a metal detector in its hallway which each person must walk through before entering. Since only one person can pass through the metal

detector at a time, a second person awaiting entry must remain outside and thus is subject to Bell's conduct for an extended period.

RULINGS OF LAW

Bell's intentional and purposeful activities, including her following and blocking patients as they approach the Clinic and her shouting of intimidating and upsetting statements to patients, create a nuisance that interferes with and disrupts the Clinic in its efforts to provide safe medical services to its patients. Bell's conduct interferes with patients' exercise of their rights to abortion. See Roe v. Wade, 410 U.S. 113 (1973); Moe v. Secretary of Administration of Finance, 382 Mass. 629, 646-49 (1981); Framingham Clinic, Inc. v. Board of Selectman of Southborough, 373 Mass. 279, 283 (1977). This constitutional right is particularly vulnerable because the opportunity to exercise it lapses within a matter of weeks. Bellotti v. Baird, 443 U.S. 622, 642 (1979). See also Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 710 (1990) ("time-sensitive nature of this right can transform a temporary delay of its exercise into a complete denial of the right"). Thus, Bell's conduct causes irreparable physical and emotional harm.

Bell has repeatedly and knowingly violated earlier injunctions. She has chosen to ignore one Court order by continuing to wear pinneys virtually identical to those worn by Clinic escorts. She has chosen to ignore another by blocking access to the Clinic and harassing and intimidating individual patients as they approach the Clinic and after they enter the Clinic. Furthermore, the Stipulation and Order entered into by Planned Parenthood and Bell forbidding Bell, among other things, from using sound amplification devices, has not achieved its desired results. Bell's voice is so loud and strong that even without artificial amplification her voice is audible

inside the Clinic waiting room. The Supreme Court has stated that "noise control is particularly important around hospitals and medical facilities during surgery and recovery periods." Madsen v. Women's Health Center, Inc., 512 U.S. ___, 129 L.Ed.2d 593, 612, (1994). See also NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783, n. 12 (1979) ("hospitals [are] where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and confor[t]ing patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere", quoting Beth Israel Hospital v. NLRB, 437 U.S. 483, 509 (1978)).

The injunction sought by Planned Parenthood creating a 50-foot buffer zone advances several significant public interests: the interest in ensuring public safety and order; the interest in protecting a woman's freedom to seek lawful medical or counselling services; the interest in the psychological and physical well-being of patients; and the interest in maintaining the integrity of court orders. See Madsen, 512 U.S. at ___, 129 L.Ed.2d at 611 ("on balance, we hold that the 36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake").

The remedy of imposing a 50-foot buffer zone[4] is no broader than necessary to achieve the desired result. See Madsen, 512 U.S. at ___, 129 L.Ed.2d at 610. This buffer zone would require Bell to remain approximately two buildings away to the left and to the right of the Clinic and on the other side of the street. With the creation of such a buffer zone, patients seeking access to the Clinic may park near the

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[4] At oral argument the parties agreed that a 50-foot buffer zone would essentially bar Bell from any portion of Beacon Street in front of the Clinic. While Bell has argued against imposition of any buffer zone, she had not contested the 50 foot range.

Clinic, or arrive by trolley, and enter the Clinic without their access impeded by Bell.

The common law of the Commonwealth recognizes a private action for public nuisance. Wesson v. Washburn Ivan Co., 13 Allen 95, 100-104 (1866), so long as special damage is caused to the plaintiff. As a result of Bell's activities Planned Parenthood has sustained special injuries: access to the Clinic has been impeded; patients are anxious and distressed; employees spend increased time counselling patients which would otherwise be spent providing medical counselling; and prospective patients either do not enter the Clinic or face increased medical risks from returning at a later date. These injuries are of a character different from that the general public shares. See Connerty v. Metropolitan Dist. Comm., 398 Mass. 140, 148 (1986).

Bell contends that the Court should not impose a buffer zone but should rather order her to lower her voice. I decline to issue such a narrow injunction because Bell engages in at least two other types of objectionable conduct: (i) she harasses and frightens patients as they approach the Clinic in that she stands in front of or in close proximity to them and blocks their way; and (ii)she repeatedly violates prior Court orders.

Bell has knowingly, intentionally and willfully crossed the boundary from conduct protected by the First Amendment to prohibited conduct. She has continually violated existing judicial decrees. The requested injunction will not prohibit Bell from engaging in constitutionally protected speech; she will merely be required to do so over 50 feet from the Clinic. The buffer zone, on balance, burdens no more speech than necessary to accomplish the public interest of ensuring public safety and order and protecting a pregnant woman's freedom to seek medical and counselling services.

ORDER

The Court, finding irreparable harm and probability of success on the merits, and balancing the interests involved, hereby ORDERS that defendant Barbara Bell is preliminarily ENJOINED from entering within 50 feet in front of, or to the right or the left of, the property line of the Planned Parenthood Clinic located at 1031 - 1033 Beacon Street, Brookline, Massachusetts, during the hours of Clinic operation, until further order of the Court. This injunction is not intended to include any private property except that owned or leased by the Clinic. Although Planned Parenthood seeks to have the injunction include in the buffer zone those individuals acting in concert with Bell, I decline to do so. On the record before me, only Bell's conduct warrants imposing a buffer zone.

/s/

Margaret R. Hinckle
Justice of the Superior Court

DATED: February 28, 1995
\bk

APPENDIX B.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

95-J-202

PLANNED PARENTHOOD LEAGUE, ET AL. [sic]

vs.

BARBARA BELL.

ORDER

The relief requested by the petitioner is denied. Although the petitioner contests the judge's finding that she "blocks" patients, the excerpt from Isabelle Guttelle's testimony submitted as Exhibit B to the respondent's opposition indicates that, at least on a preliminary basis, there is support for the judge's finding of blocking by the petitioner. This blocking occurred despite the injunction of October 28, 1991 barring the petitioner from blocking patients and interfering with ingress to the clinic.

The judge also found (a finding amply supported in the record) that the petitioner violated another injunction concerning pinneys by wearing "pinneys virtually identical to those worn by clinic escorts." Given the tension and fright caused by the petitioner's conduct in blocking patients and shouting,[1] particularly after the shooting and death at the clinic on December 30, 1994, and given the previous failure of the petitioner to abide by the earlier injunctions, the single justice

[1] The single justice has watched the videotape and heard the loud shouting by the petitioner.

does not consider the preliminary injunction granted by the judge to "burden . . . more speech than necessary to serve a significant government interest." Madsen v. Women's Health Center, 114 Sup. Ct. 2516, 20-25 (1994). The governmental concern here involved is "the strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." Id. at 2526.

Accordingly, the relief requested denied.[2]

By the Court (Dreben, J.),

/s/

Assistant Clerk

Entered: May 30, 1995.

[2] While the petitioner contested the imposition of any buffer zone, she did not contest the fifty foot range either in this court or in the trial court. She also did not contest the prohibition to her entering within fifty feet to the right or left of the property. Accordingly, except to note that that zone is only fourteen feet wider than the buffer zone approved in Madsen, the single justice has not considered the range of the injunction but only whether a buffer zone may legally be imposed.

APPENDIX C.

424 Mass. 573, 677 N.E.2d 204

Planned Parenthood *v.* Barbara Bell.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC.
vs. BARBARA BELL.

Middlesex. November 5, 1996. – March 18, 1997.

Present: WILKINS, C.J., AND ABRAMS, LYNCH, O'CONNOR, GREANEY, FRIED AND MARSHALL, JJ.

Clinic which provided abortion services brought suit seeking injunctive relief against protestor. The Superior Court, Middlesex County, Margaret R. Hinkle, J., granted preliminary injunction prohibiting protestor from entering within 50 feet of the clinic. Protestor appealed, and appeal was transferred. The Supreme Judicial Court, Abrams, J., held that: (1) clinic had standing; (2) protestor's activities were outside of realm of constitutionally protected speech; and (3) remedy was not overbroad.

Affirmed.

****205, *573** *Dwight G. Duncan* (*Luke Stanton* with him), N. Dartmouth, for defendant.

***574** *Teresa A. Martland* (*Audrey C. Mark* with her), Boston, for plaintiff.

Freda K. Fishman, Assistant Attorney General, for Attorney General, amicus curiae, submitted a brief.

ABRAMS, J. The defendant, Barbara Bell, appeals from the imposition of a preliminary injunction prohibiting her from entering within fifty feet of a Brookline clinic operated by Planned Parenthood League of Massachusetts, Inc. (PPLM).[1]

[1] The preliminary injunction states in pertinent part: "The Court, finding irreparable harm and probability of success on the merits, and balancing the interests involved, hereby ORDERS that defendant Barbara Bell is preliminarily ENJOINED from entering within 50 feet in front of, or to the right or the left of, the property line of the Planned Parenthood Clinic located at 1031-1033 Beacon Street, Brookline, Massachusetts, during the hours of Clinic operation, until further order of the Court. This injunction is not intended to include any private property except that owned or leased by the Clinic."

A Superior Court judge issued the injunction after conducting two days of evidentiary hearings and concluding ****206** that Bell had "knowingly, intentionally and willfully crossed the boundary from conduct protected by the First Amendment to prohibited conduct."

On appeal, Bell argues that the injunction should be vacated because it impermissibly infringes on her rights under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights. Bell further argues that the injunction is unconstitutionally overbroad because it burdens more speech than necessary to accomplish a significant government interest. The Superior Court judge denied Bell's motion for reconsideration or, in the alternative, her motion for stay pending appeal. A single justice of the Appeals Court denied Bell's petition for temporary relief pending appeal, holding that the injunction burdens no more speech than necessary to serve the significant government interest of "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." We transferred the appeal to this court on our own motion. We affirm.

PPLM is a nonprofit corporation that operates a clinic in Brookline which provides family planning services, including abortion. In October, 1994, on behalf of itself and its patients, PPLM brought this action seeking injunctive relief against Bell based on common law public nuisance grounds. Bell already ***575** was subject to two permanent injunctions prohibiting her from engaging in certain conduct outside the clinic. On October 17, 1991, she was enjoined from representing herself in any way as an affiliate of the clinic, including wearing a pinney (apron) such as those worn by clinic escorts. See note 8, infra. On October 28, 1991, she was enjoined from trespassing on, blocking or obstructing access

to any facility in the Commonwealth providing abortion services; and from restraining, obstructing, or committing any acts of force against any persons entering or leaving any such facility. Also, a January, 1991, stipulation and order bars her from using any sound amplification device to project any noise, including her own voice, such that it is audible inside the clinic.

PPLM argued that the injunctive relief was necessary because Bell persistently engaged in the following activity: (1) she wore a pinney falsely representing herself as an agent of the clinic in violation of the first court order; (2) she shouted loudly outside the clinic such that her voice could be clearly heard inside the clinic; and (3) she harassed and intimidated patients who attempted to enter the clinic by crowding them and blocking their way.

The judge found that Bell regularly rushed up to patients and the persons accompanying them, making uninvited contact and following them as they crossed the trolley tracks and Beacon Street to reach the clinic. Bell also rushed up to cars as drivers attempted to park and drop off patients. She confronted patients by walking in front of or in close proximity to them, steadily shouting statements such as "no mother is ever the same after her baby's been ripped out of her womb."

Patients reacted to Bell by turning away from the clinic, raising an outstretched hand to ward off her advances, and by running away from her. Nonetheless, Bell would persist. The judge found that, while other clinic protestors, "often stand beside and behind patients, [Bell] alone stands in front of patients, on occasion blocking them."

When scheduling appointments, the clinic's staff instruct patients to look for clinic escorts if they need assistance entering the clinic. The judge found that Bell continued to wear pinneys closely resembling those worn by the escort

staff, in violation of the permanent injunction issued against her on *576 October 17, 1991. On one occasion, Bell started the morning wearing a pinney of the same color as the escorts' pinneys, and when the escorts changed to pinneys of a different color, Bell did the same. Although Bell's pinneys bore different lettering, the judge found that the resemblance to escort pinneys was so strong that some patients approaching the clinic became confused as to which persons were the true clinic escorts.[2]

**207 Bell frequently stood approximately ten feet from the clinic, shouting to the patients seated in the waiting room inside the clinic. The clinic staff would turn on music and the air conditioner in an attempt to minimize the impact of Bell's voice, but her voice remained audible inside the clinic. In contrast, other street noises, including the trolley, were virtually inaudible.

The judge found that Bell's shouts distressed clinic patients and staff, created anxiety, and impeded the effective provision of medical services. Patients who were the target of Bell's advances outside the clinic often entered crying, trembling, and exhibiting other symptoms of fear and apprehension. As a result, clinic staff had to take time away from providing medical services in order to calm patients instead. The judge also found that those patients who reacted to Bell's advances by turning away from the clinic were subject to increased health risks due to the delay in services.

On December 30, 1994, an unrelated shooting occurred at the clinic. Several people were injured, and the clinic's receptionist was killed. The judge found that Bell still persisted in her tactics, and that after the shooting, the patients' adverse reactions to Bell's conduct intensified. Patients often had to remain outside the clinic, waiting to pass

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[2] The court noted that patients who cannot read English were particularly likely to be confused by Bell's pinney.

through a metal detector which was installed at the entrance to the clinic after the shooting. Consequently, such patients were subject to Bell's conduct for an extended period.

Based on these findings, the judge ruled that Bell's activity crossed the boundary from protected speech to prohibited conduct, creating a nuisance which disrupted the clinic's efforts to provide safe medical services and interfered with ***577** patients' exercise of their right to abortion. Because of the time sensitive nature of that right, Bell's conduct caused irreparable physical and emotional harm. See *Bellotti* v. *Baird*, 443 U.S. 622, 642, 99 S.Ct. 3035, 3047-48, 61 L.Ed.2d 797 (1979); *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 406 Mass. 701, 710, 550 N.E.2d 1361 (1990). Bell repeatedly and knowingly had violated prior court orders by continuing to wear a pinney, and by blocking, harassing, and intimidating patients who attempted to enter the clinic. The judge further noted that the stipulation and order which prohibited Bell from using sound amplification devices had not achieved its desired result because, even unamplified, Bell's voice is strong and loud enough to be heard inside the clinic.

The judge determined that the imposition of a fifty-foot distance restriction advanced several significant public interests, including ensuring public safety and order, protecting a woman's freedom to seek lawful medical or counselling services, protecting the psychological and physical well being of patients, and maintaining the integrity of court orders. See *Madsen* v. *Women's Health Ctr., Inc.*, 612 U.S. 753, 767-69, 114 S.Ct. 2516, 2526, 129 L.Ed.2d 593 (1994). The remedy was no broader than necessary to achieve the desired result of enabling patients to park near the clinic or arrive by trolley and enter the clinic without their access impeded by Bell, and Bell could still engage in constitutionally protected speech outside of fifty feet from the

clinic.[3] See *id.* at 769-71, 114 S.Ct. at 2527. The judge concluded that the buffer zone, on balance, burdens no more speech than necessary to accomplish these significant public interests. See *id.* at 775-77, 114 S.Ct. at 2530.

[1][2] I. Standing. We begin by addressing Bell's contention that PPLM does not have standing to obtain the preliminary injunction at issue. Under the common law ****208** of the Commonwealth, ***578** a private plaintiff may maintain a public nuisance[4] action if the public nuisance has caused the plaintiff some special injury of a direct and substantial character other than that borne by the general public. See *Connerty* v. *Metropolitan Dist. Comm'n*, 398 Mass. 140, 148, 495 N.E.2d 840 (1986); *Wesson* v. *Washburn Iron Co.*, 95 Mass. 95, 13 Allen 95, 100-104 (1866). PPLM has alleged that Bell's conduct constitutes a public nuisance which has caused its patients special injury by interfering with the exercise of their right to obtain an abortion." At the very least, the right to choose to terminate a pregnancy by abortion has been recognized as a substantive right under both the Federal

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[3] Prior to the final arguments and the issuance of the injunction, defense counsel described Beacon Street (divided roadway with trolley tracks running into and out of Boston) to the judge. He noted that the clinic side of Beacon Street consists of three lanes: one parking lane and two travel lanes. Each lane is approximately twelve feet wide, making the entire width of the clinic side of the street approximately thirty-six feet. There are approximately ten additional feet from the sidewalk to the entrance of the clinic, or clinic property. Defense counsel explained that therefore a fifty-foot distance restriction would place the defendant across the clinic side of Beacon Street and onto the median strip where the trolley tracks run. Plaintiffs' counsel confirmed that it is fifty feet from the front of the clinic to the trolley tracks.

[4] "A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." *Connerty* v. *Metropolitan Dist. Comm'n*, 398 Mass. 140, 148, 495 N.E.2d 840 (1986).

and State Constitutions." *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 406 Mass. 701, 707, 550 N.E.2d 1361 (1990), citing *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Moe* v. *Secretary of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981). Given the nature of the injury involved, we believe that this allegation would sufficiently state a case in public nuisance if the patients had been included as plaintiffs. See *Connerty, supra.* However, PPLM maintains that as an abortion provider, it has representational standing to argue the rights of its patients who are not parties to the action.[5] See *Planned Parenthood League of Mass., Inc.* v. *Blake,* 417 Mass. 467, 472 & n. 7, 631 N.E.2d 985, *cert. denied,* --- U.S. ---, 115 S.Ct. 188, 130 L.Ed.2d 122 (1994).

[3] Although jus tertii standing is infrequently granted, the United States Supreme Court has established that it is appropriate in the presence of two factual elements. See *Singleton* v. *Wulff,* 428 U.S. 106, 113-118, 96 S.Ct. 2868, 2873-2877, 49 L.Ed.2d 826 (1976). First, the relationship of the litigant to the third party whose right the litigant seeks to assert must be such that "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue." *Id.* at 114, 96 S.Ct. at 2874. Second, there must be some genuine obstacle that renders the third party unable to assert the allegedly affected right on his or her own behalf. *Id.* at 115-116, 96 S.Ct. at 2874-2875. As a prudential matter, physicians are well situated to argue the rights of women patients regarding *579 interference with the abortion decision because the nature of the doctor-patient relationship assures

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[5] The judge found that the clinic had sustained special injuries in its own right as a result of the public nuisance created by Bell's conduct, and therefore ruled that PPLM had direct standing to seek injunctive relief on its own behalf. In the view we take, we need not reach this issue because PPLM's representational standing supports the maintenance of this action.

effective presentation of the patients' rights, and a woman's assertion of her own rights may be obstructed by privacy and mootness issues. *Id.* at 116-118, 96 S.Ct. at 2875-2876 (plurality granting physicians representational standing to challenge abortion statute). Accord *Doe* v. *Bolton,* 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973) (physician has standing to challenge abortion statute due to "sufficiently direct threat of personal detriment"). See also *Margaret S.* v. *Edwards,* 794 F.2d 994, 997 (5th Cir. 1986) ("the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases").

Lower Federal courts have generally held that abortion providers have representational standing to argue the constitutional rights of their patients. See, e.g., *New York St. Nat'l Org. for Women* v. *Terry,* 886 F.2d 1339, 1347-1348 (2d Cir. 1989), *cert. denied,* 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *Planned Parenthood Ass'n of Cincinnati, Inc.* v. *Cincinnati,* 822 F.2d 1390, 1394-1396 (6th Cir. 1987). See also *Volunteer Medical Clinic, Inc.,* v. *Operation Rescue,* 948 F.2d 218, 223 (6th Cir. 1991) ("the rights of women seeking to exercise their Fourteenth Amendment right to an abortion [are] inextricably bound up with the services provided by the clinic, and . . . 'women seeking to assert that right for themselves are faced with several obstacles'"). We hold that in these circumstances where access to abortion ****209** is concerned, PPLM has standing to bring the present action against Bell.

[4] II. The preliminary injunction. The traditional standard for reviewing the issuance of a preliminary injunction is "whether the [trial] court abused its discretion. An appellate court's role is to decide whether the [trial] court applied proper legal standards and whether there was reasonable support for its evaluation of factual questions." *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue,* 406 Mass. 701,

710, 550 N.E.2d 1361 (1990). However, Bell claims that the challenged activity on which the judge based the issuance of the injunction is in the nature of constitutionally protected speech. Bell's invocation of the First Amendment requires us to engage in an independent examination of the whole record to "decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection," notwithstanding the ***580** trial judge's conclusions to the contrary.[6] See *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, --- U.S. ---, 115 S.Ct. 2338, 2344, 132 L.Ed.2d 487 (1995) (requirement of independent appellate review is a rule of Federal constitutional law).

[5] The judge concluded that Bell creates an actionable nuisance and issued the injunction based on three categories of Bell's activity: her wearing of pinneys in violation of the first court order, the volume of her voice, and her blocking of patients in violation of the second court order. After careful consideration of the entire record, we agree with the judge's findings and conclude that the factual characteristics of Bell's activity place it outside of the realm of constitutionally protected speech. See *Hurley*, supra at 115 S.Ct. at 2344. We address each basis in turn.

First, Bell's violation of the pinney injunction is amply demonstrated by live testimony and by videotape evidence which clearly depicts Bell outside the clinic on several occasions wearing a pinney closely resembling those worn by the clinic escorts. Bell argues that she did not violate the injunction because since her pinney is larger, pocketed, and bears different lettering than the escorts' pinneys, she did not misrepresent herself as a clinic affiliate. Bell's argument is

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[6] Bell has not argued that the State Constitution provides her greater protection than does the First Amendment. Thus, we decide this issue solely under Federal constitutional law.

rendered suspect by her practice of changing pinneys to correspond with the color worn by the clinic escorts.[7] Regardless, our review of the videotape convinces us that these slight factual dissimilarities do not sufficiently differentiate Bell's pinneys such that patients would not easily mistake her as an affiliate of the clinic, particularly in light of potential language barriers and the short time frame during which a patient approached by Bell and the escorts must process who is who. Our conclusion is further buttressed by testimony that patients did become confused and assume Bell was an escort. The First Amendment does not shelter Bell's persistent violation of an existing court order.[8]

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[7] Three witnesses testified to Bell's behavior on this point. One witness testified that Bell kept a pinney in the trunk of her car and switched colors midmorning after observing the escorts do so.

[8] After our decision in *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, supra, and further proceedings in the Superior Court, the judge permanently enjoined Bell from wearing pinneys similar to those worn by the clinic escorts. Bell did not appeal from that permanent injunction. See also *Planned Parenthood League of Mass., Inc.* v. *Blake*, 417 Mass. 467, 631 N.E.2d 985, cert. denied, --- U.S. ---, 115 S.Ct. 188, 130 L.Ed.2d 122 (1994). We note that the judge who issued the pinney injunction found that "[t]he actions of [another protester] and Bell in wearing 'clinic escort' pinneys and representing themselves to be agents of Planned Parenthood were intended to harass and annoy the clinic's patients." The judge held that although this activity does not "rise[ ] to the level of threats, intimidation and coercion necessary to constitute a violation of the [Massachusetts Civil Rights Act] . . . [it] does, however, constitute intentional interference with the clinic's contractual relations with its patients, without any right or justification, and such conduct must therefore be enjoined." After the injunction issued, Bell changed the lettering on her pinney from "Clinic Escort" to "Choose Life." However, the injunction made no reference to lettering and clearly prohibited Bell from wearing any pinney similar to those worn by the escorts.

**210 Second, Bell does not contest the judge's finding that the *581 volume of her voice is such that despite the clinic's measures to diminish its impact, her voice reaches the interior of the clinic.[9] Rather, Bell claims that the judge issued the injunction based on the content of her speech, not the volume at which the words were spoken. See *Madsen*, supra at 761-763, 114 S.Ct. at 2523. Bell correctly states that, absent evidence that her speech is independently pr[o]scribable (i.e., "fighting words" or threats), it would be impermissible for the judge to have considered the content or meaning of Bell's message in issuing the injunction. See id. at 773-775, 114 S.Ct. at 2529. However, any person bellowing into the entrance of a medical facility creates a noxious and unwelcome condition inside, regardless of what he or she is shouting. After careful consideration of the record, we cannot conclude that the judge based the injunction on the content of Bell's speech rather than on the volume of her voice.

Recognizing that "[n]oise control is particularly important around hospitals and medical facilities," the United States Supreme Court made clear in *Madsen*, supra at 772-773, 114 S.Ct. at 2528, that the "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." See also *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 783-784 n. 12, 99 S.Ct. 2598, 2604-2605 n. 12, 61 L.Ed.2d 251 (1979), quoting *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 609, 98 S.Ct. 2463, 2477, 57 L.Ed.2d 370 (1978) (Blackmun, J., concurring ("'Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated,

[9] We note that this finding is well substantiated by the record. Even a witness appearing on Bell's behalf testified that Bell "talked into the clinic," raising her voice so as to be heard by the women inside.

where patients and relatives alike often are *582 under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere' "). Bell's practice of hollering into the clinic is clearly actionable conduct unprotected by the First Amendment.

Third, Bell challenges the judge's finding that she blocked patients seeking to enter the clinic. Bell claims she was merely engaging in "sidewalk counselling," by which she approaches patients and attempts to dissuade them from having an abortion. Bell argues that the judge mischaracterized this classic exercise of her First Amendment right to speak in a public forum as harassment, intimidation, and blocking.

Five witnesses testified as to Bell's conduct in confronting patients. All of them, including a fellow sidewalk counsellor who testified on Bell's behalf, confirmed that Bell stood in front of patients as they attempted to enter the clinic. One witness testified that Bell's conduct included "blocking, standing so close to the patients so that they can't move." The witness described the efforts of the clinic escorts to assist patients in getting past Bell: "We'll just get into position beside the patient, one on each side, and we'll try to go forward, and on the worst scenario, Barbara Bell will be in front facing us, and when we move to one side, she'll move to one side, and we'll move to the other side, and she'll move to the other side, too. We're kind of doing a dance down the street." Another witness stated that when snowbanks bound the sidewalk, patients could not get past Bell unless they pushed into her or climbed over the snowbanks. There was also testimony that Bell stood closely in front of car doors, "trapping" patients in their cars.

Bell argues that we should discount this live testimony in light of the judge's finding that the videotape of Bell "shows

no blocking, whatsoever."[10] However, the videotape is not conclusive where there is strong live testimony. See *Madsen,* supra 770, 114 **211 S.Ct. at 2527. ("witnesses also testified as to relevant facts in *583 a [three]-day evidentiary hearing, and the state court was therefore not limited to . . . the videotape to make its findings in support of the [broader] injunction"). See also *Hurley*, supra at 115 S.Ct. at 2344 (the requirement of independent appellate review does not limit our deference to a trial judge on matters of witness credibility). We conclude that, as the judge found, the record amply demonstrates that Bell, who is a tall and large woman, routinely positioned herself so as to impede and obstruct the progress or passage of patients to the clinic, thereby engaging in behavior which constitutes "blocking" in the most basic sense of the word. See Webster's Third New Int'l Dictionary 235 (1961).

[6] Bell's First Amendment right to engage in "sidewalk counselling" does not encompass the right to obstruct women in the exercise of their constitutional right to seek lawful medical or counselling services regarding abortion. See *Madsen*, supra at 767-769, 769-771, 114 S.Ct. at 2526, 2527. See also *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, supra at 716, 550 N.E.2d 1361, quoting *Brookline* v. *Goldstein,* 388 Mass. 443, 450, 447 N.E.2d 641 (1983) ("The right to free speech '[does] not disable the government from taking reasonable steps to ensure that (this right is] not exercised in a manner which infringes on the legitimate rights of other citizens'").

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[10] We note that the videotape does show Bell crowding patients, shouting loudly into their faces from an extremely close proximity, giving chase to a woman who runs away from her into a busy street, and standing closely in front of the door of a car idling in a busy traffic lane. We need not address whether this behavior is itself prohibited because the issuance of the injunction is well supported on other bases.

In sum, Bell's blocking of patients, her repeated violation of prior court orders, and the volume of her shouting is objectionable activity unsheltered by the First Amendment. We therefore reject Bell's claim that the preliminary injunction is content or viewpoint based. The purpose of the injunction is not to suppress Bell's antiabortion message, but rather to prevent her from further engaging in objectionable activity. See *Madsen*, supra at 761-765, 114 S.Ct. at 2523-2524 (holding injunction content neutral because the court's purpose in imposing restrictions on petitioners incidental to their antiabortion message was that they repeatedly violated the court's original order). We think that the injunction was justified "without reference to the content of the regulated speech." *Madsen*, supra at 763, 114 S.Ct. at 2623, quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-2754, 105 L.Ed.2d 661 (1989).

[7] We now address Bell's argument that the remedy is unconstitutionally overbroad because it prohibits her from engaging even in protected activity within fifty feet of the clinic. See *Planned Parenthood League of Mass., Inc.* v. *Operation* ***584** *Rescue*, supra at 713, 550 N.E.2d 1361 (Judge must carefully tailor an injunction so as to avoid an impermissible infringement on protected expression). Recently, in *Schenck* v. *Pro-Choice Network of W.N.Y.*, 65 U.S.L.W. 4109, 4111, 4116, --- U.S. ---, ---, ---, 117 S.Ct. 855 ---, ---, --- L.Ed.2d --- (Feb. 19, 1997), the United States Supreme Court reaffirmed *Madsen* and again upheld the imposition of a fixed buffer zone to ensure clinic access. In *Madsen*, supra at 765, 114 S.Ct. at 2626, the Court established that "when evaluating a content-neutral injunction, . . . [the] standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether . . . 'the injunction burden[s] no more speech than necessary to serve a significant government interest.' " Here, the judge determined that the

interests served by the injunction include ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counselling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders. We think, as the Supreme Court did in *Madsen*, supra at 767-69, 114 S.Ct. at 2626, and in *Schenck*, supra at 4115, 117 S.Ct. at ---, that these governmental interests are "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics."

In considering the scope of the restriction imposed on Bell, we note that the injunction upheld in *Madsen* created an essentially absolute speech-free buffer zone which admitted no antiabortion protestors within thirty-six feet of the clinic.[11] Here, the injunction ****212** is significantly narrower in that it is directed to only one individual who has a long history before the court. In light of Bell's recalcitrance, the judge concluded that the fifty-foot distance restriction was necessary to protect clinic access by allowing patients to park near the clinic, or arrive by trolley, and enter the clinic without their access impeded by Bell. Three prior court orders have failed to restrain Bell from engaging in objectionable behavior. She has disobeyed other injunctions by continuing to misrepresent herself as a clinic affiliate and by blocking patients seeking to enter the clinic. The order banning Bell from amplifying her ***585** voice has not achieved its purpose because Bell's unamplified voice can still be heard inside the clinic. "The failure of the [previous] order[s] to accomplish [their] purpose

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[11] The court order upheld in *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), was directed not only to the petitioners, but also to "Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and . . . all persons acting in concert or participation with them, or on their behalf." See id. at --- n. 1, 114 S.Ct. at 2521 n. 1.

may be taken into consideration in evaluating the constitutionality of the broader order." *Madsen,* supra at 770, 114 S.Ct. at 2527.

Bell claims that the court should have ignored her violations of the pinney and antiblocking injunctions, leaving those issues to be tried in separate contempt proceedings, and imposed the less restrictive remedy of ordering her to lower her voice. We do not agree. The judge was required to consider the full extent of Bell's conduct as shown by the plaintiff in the case before her, including the violations, in determining whether Bell created a public nuisance. Having considered all the testimony as well as the prior orders, the judge properly issued an injunction that effectively addressed all three forms of Bell's unprotected conduct.

In sum, under the injunction, Bell would be far enough away so that she could no longer obstruct patient access, be heard inside the clinic, or be mistaken for a clinic escort because of her pinney. The need for a distance restriction may be debatable, "but some deference must be given to the [trial judge's] familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen,* supra at 769-770, 114 S.Ct. at 2527. See *Schenck*, supra at 4116, 117 S.Ct. at ---. On balance, we think that the fifty-foot distance restriction imposed on Bell burdens no more speech than necessary to serve the significant public interests at stake.

Bell still can engage in constitutionally protected speech while standing across the street, or two buildings away to the left and to the right of the clinic. From that distance,[12]

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[12] While Bell has argued against the imposition of any distance restriction, she never has contested its fifty-foot range. Accordingly, we do not reach this issue except to note that the distance restriction imposed on Bell is only fourteen feet greater than that upheld in *Madsen*. See also *Schenck* v. *Pro-Choice Network of W.N.Y.*, 65 U.S.L.W. 4109, 4111, 4116, --- U.S ---, ---, ---, 117 S.Ct. 855 ---, ---, --- L.Ed.2d --- (Feb. 19, 1997)

particularly given the volume of her voice, she can still be seen and heard by patients arriving at the clinic. See *Madsen*, supra at 769-71, 114 S.Ct. at 2527.

Judgment affirmed.

(declining to "quibble" about the range of the fixed buffer zone and deferring to the trial court's "reasonable assessment of the number of feet necessary" to fulfil the goal of ensuring clinic access). See note 3, supra.

(2)

Supreme Court, U.S.
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No. 96-1981

In the Supreme Court of the United States

OCTOBER TERM, 1996

BARBARA BELL,
PETITIONER,

v.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the buffer zone injunction issued against petitioner Barbara Bell alone, to prevent her from further blocking of patients, further violating prior court orders, and further shouting loudly into a medical facility, is an unconstitutional content-based restriction on speech.

II. Whether the fifty-foot distance restriction imposed on Bell alone burdens more speech than necessary to serve the significant government interests of ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders, given that three prior court orders have failed to restrain Bell from engaging in objectionable conduct.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Planned Parenthood League of Massachusetts, Inc. ("Planned Parenthood") respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts, Appendix C to the petition.

STATEMENT OF THE CASE

Having engaged in purposeful behavior including harassing and intimidating patients attempting to enter a Planned Parenthood clinic (the "Clinic") by crowding them and blocking their way in violation of a court order, shouting so loudly that her voice could be heard clearly within the Clinic, and wearing a cloth "pinney" falsely representing herself as an agent of the Clinic in violation of another court order, petitioner Barbara Bell argues that the fifty-foot buffer zone imposed on her alone to prevent her from further engaging in such objectionable conduct is an unconstitutional content-based restriction on her speech. Alternatively, Bell argues that the injunction is overbroad and that the court should have issued an order addressing only the volume of her voice. Bell's arguments did not succeed in the Massachusetts Supreme Judicial Court and cannot succeed here.

The buffer zone injunction against Bell was issued by the trial court after two days of evidentiary hearings which included testimony of five witnesses as well as the submission of affidavits and a videotape showing Bell's conduct outside the Clinic. Based upon this evidence, the trial judge concluded that "Bell creates an actionable nuisance" and issued the preliminary injunction "based on three categories of Bell's activity: her wearing of pinneys in violation of [one] court order, the volume of her voice, and her blocking of patients in violation of [another] court order." Petition, 20a.

The SJC conducted a de novo review of the record, Petition, 20a, and upheld the trial court's findings.

> After careful consideration of the entire record, we agree with the judge's findings and conclude that the factual characteristics of Bell's *activity* place it outside the realm of constitutionally protected speech.

Id. (emphasis added)

The SJC carefully reviewed each category of Bell's activity at issue. First, the SJC noted that Bell's violation of the pinney injunction was "amply demonstrated by live testimony and by videotape evidence which clearly depicts Bell outside the Clinic on several occasions wearing a pinney closely resembling those worn by the Clinic escorts." Petition, 20a. The SJC rejected Bell's argument that she did not violate the injunction because her pinney differed slightly from the Clinic escort pinneys,[1] explaining that the SJC's own review of the videotape evidence convinced it that the

> slight factual dissimilarities do not sufficiently differentiate Bell's pinneys such that patients would not easily mistake her as an affiliate of the clinic, particularly in light of potential language barriers and the short time frame during which a patient approached by Bell and the escorts must process who is who.

Petition, 21a. Moreover, there was evidence that patients did in fact become confused and assume Bell was an escort. Petition, 4a, 15a. The SJC concluded (as to Bell's wearing of a pinney) that "[t]he First Amendment does not shelter Bell's persistent violation of an existing court order." Petition, 21a.

With regard to the volume of Bell's voice, Bell did not contest the trial court's well-substantiated finding that the volume of her voice is such that despite the Clinic's measures to diminish its impact, her voice reaches the interior of the Clinic."[2] *Id.*, 22a. Bell argued instead that the injunction was based upon the content of her speech, and not its volume. The SJC rejected Bell's argument on the grounds that:

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[1] The SJC noted that "Bell's argument is rendered suspect by her practice of changing pinneys to correspond with the color worn by the clinic escorts," a practice that was testified to by three witnesses. Petition 20a-21a, n. 7.

[2] As the SJC noted in its decision, "[e]ven a witness appearing on Bell's behalf testified that Bell 'talked into the clinic,' raising her voice so as to be heard by the women inside." Petition, 22a.

> any person bellowing into the entrance of a medical facility creates a noxious and unwelcome condition inside, regardless of what he or she is shouting. After careful consideration of the record, we cannot conclude that the judge based the injunction on the content of Bell's speech rather than on the volume of her voice ..... Bell's practice of hollering into the Clinic is clearly actionable conduct unprotected by the First Amendment.

Petition, 22a-23a. *See Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 772-773 (1994), *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 783-84, n. 12 (1979); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 508-509 (1978); (each recognizing that noise control is particularly important around hospitals and medical facilities).

Finally, the SJC rejected Bell's challenge of the trial court finding that she blocked patients seeking to enter the clinic. The SJC noted that all five witnesses who testified during the evidentiary hearings — including a fellow "sidewalk counselor" who testified on Bell's behalf — confirmed that Bell stood in front of patients as they attempted to enter the Clinic. *Id.*, 23a.

> One witness testified that Bell's conduct included "blocking, standing so close to the patients so that they can't move." The witness described the efforts of the clinic escorts to assist patients in getting past Bell; "We'll just get into position beside the patient, one on each side, and we'll try to go on forward, and on the worst scenario, Barbara Bell will be in front facing us, and when we move to one side, she'll move to one side, and we'll move to the other side, and she'll move to the other side, too. We're kind of doing a dance down the street." Another witness stated that when snowbanks bound the sidewalk, patients could not get past Bell unless they pushed into her or climbed over the snowbank. There was also tes-

timony that Bell stood closely in front of car doors, "trapping" patients in their cars.

Petition, 23a

The SJC concluded that:

> The record amply demonstrates that Bell, who is a tall and large woman, routinely positioned herself so as to impede and obstruct the progress or passage of patients to the Clinic, thereby engaging in behavior which constitutes "blocking" in the most basic sense of the word.

Petition, 24a.

Based upon its review of the entire record, and applying this Court's holding in *Madsen*, 512 U.S. at 761-765, the SJC concluded that the injunction is content neutral:

> Bell's blocking of patients, her repeated violation of prior court orders, and the volume of her shouting is objectionable activity unsheltered by the First Amendment. We therefore reject Bell's claims that the preliminary injunction is content or viewpoint based. The purpose of the injunction is not to suppress her antiabortion message, but rather to prevent her from further engaging in objectionable activity.

Petition, 25a.

Having determined that the injunction is content neutral, the SJC next considered Bell's argument that the fifty-foot restriction is constitutionally overbroad. Applying the test set forth in *Madsen* to evaluate the constitutionality of a content-neutral injunction, the SJC asked whether the injunction "burden[s] no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765; *Schenck* v. *Pro-Choice Network of Western New York*, __ U.S. __, 117

S. Ct. 855, 864 (1997). The trial court had determined that the interests served by the injunction include "ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders." The SJC, applying this Court's rulings in *Madsen* and in *Schenck*, agreed that these interests are certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics." Petition, 26a.

With regard to the scope of the injunction, the SJC noted that three prior court orders had failed to restrain Bell from engaging in objectionable behavior. The SJC rejected Bell's claim that "the court should have ignored Bell's violation of the pinney and antiblocking injunctions, leaving those issues to be tried in separate contempt proceedings, and imposed the less restrictive remedy of ordering her to lower her voice." Petition, 27a. The SJC held that the trial judge was required to consider the full extent of Bell's conduct, and held that the trial judge had "properly issued an injunction that effectively addressed all three forms of Bell's unprotected conduct." *Id.* The SJC concluded:

> In sum, under the injunction, Bell would be far enough away so that she could no longer obstruct patient access, be heard inside the clinic, or be mistaken for a clinic escort because of her pinney. . . . On balance, we think that the fifty-foot distance restriction imposed on Bell burdens no more speech than necessary to serve the significant public interests at stake.

Petition, 27a.

No justice of the SJC dissented from the court's decision upholding the buffer zone injunction against Bell.

REASONS FOR DENYING THE WRIT

No important issue of federal law is presented by the SJC decision. The decision upholds issuance of a buffer zone injunction against one individual based upon that individual's conduct and this Court's recent rulings in *Madsen*, 512 U.S. 753 (1994) and *Schenck*, __ U.S. __, 117 S. Ct. 855 (1997). Applying the rulings of *Madsen* and *Schenck* to the facts of this case, the SJC held first that the injunction is content neutral because the purpose of the injunction was not to suppress Bell's antiabortion message but rather to prevent her from engaging further in objectionable conduct. Petition, 25a. *See Madsen*, 512 U.S. at 761-765. The SJC then considered Bell's conduct, which included blocking patients' access into the Clinic in violation of a court order, shouting loudly such that her voice could be heard clearly within the Clinic, and wearing a pinney falsely representing herself as an agent of the Clinic in violation of another court order. Based upon this conduct, the SJC concluded that the buffer zone injunction against Bell is constitutional because it "burden[s] no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765, *Schenck*, 117 S. Ct. at 864.

I. The Fifty-Foot Buffer Zone Injunction Is Content Neutral

Bell attempts to persuade this Court that she is a "solitary, non-violent picketer" attempting to converse with patients approaching the Clinic, and that it is the content of her speech that caused the trial court to issue the buffer zone injunction. The factual record of this case demonstrates that this is simply not so. It was Bell's conduct that caused Planned Parenthood to seek—and the trial court to issue—the buffer zone injunction, and it is Bell's conduct that justifies issuance of the injunction without reference to the content of Bell's speech.

See Madsen, 512 U.S. at 763, quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

In *Madsen*, this Court considered whether an injunction similar to the one at issue (except that the *Madsen* injunction applied to numerous individuals and groups, instead of only one person) was content or viewpoint based because it restricted only the speech of antiabortion protestors. *Madsen* at 762. The Court rejected the argument, explaining that "an injunction, by its nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group." *Id.* Thus, to determine content neutrality, a court must look to the purpose of the injunction. In *Madsen*, this Court determined that an injunction was content-neutral where the state court [had] imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court s original order." *Id.* at 763.

Here, contrary to Bell's claims, the injunction was not issued to prevent Bell's antiabortion message from being heard. Bell is distinguishable from the other antiabortion protestors outside the Clinic, including so-called "sidewalk counselors," not because of the content of her message (which is probably the same as or similar to the many other sidewalk counselors who picket the Clinic and are *not* subject to any buffer zone) but because of her particular objectionable conduct while delivering her message. The record of this case (as discussed above at pp. 2-6) amply supports the SJC's conclusion that Bell engaged in "objectionable activity unsheltered by the First Amendment." Petition, 25a. Thus, applying this Court's test set forth in *Madsen*, the SJC properly concluded that the injunction is not content or viewpoint based because:

> [t]he purpose of the injunction is not to suppress her antiabortion message, but rather to prevent her from further engaging in objectionable activity.

Petition, 25a.

II. The Injunction Burdens No More Speech Than Necessary To Achieve Significant Government Interests

The test for determining the constitutionality of a content-neutral injunction is now well settled: such an injunction must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765; *Schenck*, __ U.S. __, 117 S. Ct. at 864.[3] In both *Madsen* and *Schenck*, this Court upheld fixed[4] buffer zone injunctions, issued as remedies against conduct interfering with access to abortion, on the grounds that the injunctions "burden[ed] no more speech than necessary to serve a significant governmental interest." *Madsen, supra; Schenck, supra.* As the SJC decision makes clear, the injunction at issue here was upheld based upon the same grounds. Indeed, as the SJC noted, the injunction against Bell is "significantly narrower" than that upheld in *Madsen*, in that the Bell injunction is directed to only one individual who has a long history before the court," Petition, 26a, whereas the *Madsen* injunction was directed at numerous individuals and organizations, as well as "all persons acting in concert or participating with them, or on their behalf." *Madsen*, 512 U.S. at 759, n. 1.

Here, the fifty-foot buffer zone injunction is directed

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[3] Given this Court's decisions in *Madsen* and *Schenck*, it is puzzling how Bell can assert that "[t]here is no precedent for this type of injunction." Petition, 21.

[4] In *Schenck*, the Court also considered a challenge to a "floating" buffer zone restriction which prohibited demonstrating "within fifteen feet of any person or vehicle seeking access to or leaving [abortion] facilities." *Schenck*, __ U.S. __, 117 S. Ct. at 861, n. 3. The Court struck down this restriction on the grounds that because the prohibition "floats", it would be difficult for a protestor to know how to remain in compliance, and the "lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at __, 117 S. Ct. 867. Petitioner's reliance on *Schenck* to support her argument that the injunction at issue is overbroad is misguided. The injunction against Bell is a *fixed* fifty foot restriction, and thus creates none of the uncertainty that caused this Court to strike down the "floating" provision in Schenck.

against only one individual whose objectionable behavior has not been restrained by three prior court orders.[5] Bell has violated prior injunctions by continuing to represent herself as a clinic affiliate and by blocking patients seeking to enter the clinic, and the sound amplification order "has not achieved its purpose because Bell's unamplified voice can still be heard inside the clinic." Petition, at 26a. *See Madsen*, 512 U.S. at 770 ("failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order").[6] Bell's contention that the proper remedy would have been to order her to lower her voice was rejected by the trial court and the SJC, on the grounds that such an order would not address the full range of Bell's objectionable conduct.

> The judge was required to consider the full extent of Bell's conduct as shown by the plaintiff in the case before her, including the violations, in determining whether Bell created a public nuisance. Having considered all of the testimony, as well as the prior orders, the judge properly issued an injunction that effectively addressed all three forms of Bell's unprotected conduct.

Petition 27a.

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[5] This injunction is easily distinguished from the one ruled unconstitutional by the Ninth Circuit in *U.S.* v. *Dinwiddie*, 76 F.3d 913 (9th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 613 (1996). The *Dinwiddie* injunction applied within 500 feet of any reproductive health facility in the United States, and allowed the defendant to engage only in activity "that could not be remotely construed to violate [the Fedeal clinic access act]." The Ninth Circuit held, among other things, that the term "remotely construed" was vague and the injunction as worded burdened more speed than necessary. *Id.*, at 927-928. Here, the injunction prohibits Bell only from entering within fifty feet of one clinic, and there is no issue as to vagueness.

[6] The interests served by the injunction include "ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders." Petition, 26a, *see also Madsen*, 512 U.S. at 767-69; *Schenck*, 117 S. Ct. at 866, Bell acknowledges that "the state does have a significant interest in assuring patients' access to clinics and maintaining quiet inside clinics." Petition, 19.

The "alternative remedy" proposed by Bell addresses only one form of Bell's objectionable conduct (the volume of her voice) and ignores Bell's wearing of a pinney falsely representing that she is affiliated with the Clinic in violation of a prior injunction and Bell's blocking of patients' access into the Clinic in violation of another injunction. Bell's proposed alternative fails to serve the significant government interests of "ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders," Petition, 26A, and was thus properly rejected by the trial court as inadequate.

Finally, the injunction does leave an adequate means of communication open to Bell. Bell remains free to say whatever she wishes provided that she remains fifty feet away from the clinic entrance.[7] Given the volume of Bell's voice, the SJC concluded that from that distance "she can still be seen and heard by patients arriving at the clinic." *See Madsen*, 512 U.S. at 770 (protestors outside the buffer zone could still be seen and heard from the clinic parking lots).[8]

CONCLUSION

In upholding the fifty-foot buffer zone injunction against petitioner Barbara Bell alone, the SJC did not make new federal law. The SJC applied the test for assessing the constitutionality of a buffer zone injunction, adopted by this Court in *Madsen* in 1994, and affirmed in *Schenck* in 1997, to the

[7] Bell has never contested the size of the buffer zone, Petition, 27a, n. 12 and cannot do so here for the first time.

[8] Bell complains that this alternative is not adequate because "the nature of sidewalk counseling necessitates that the counselor speak in a conversational tone with the pregnant woman," and "[t]he injunction makes this impossible." Petition at 22. Bell's complaint is ironic given that the volume of Bell's voice (which was certainly not at a conversational level) was one aspect of Bell's conduct that caused Planned Parenthood to seek this injunction.

factual circumstances of this case, and determined that the content-neutral buffer zone injunction is constitutional because it "burden[s] no more speech than necessary to serve a significant governmental interest."

Bell's petition for a writ of certiorari should be denied.

Respectfully submitted,

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